Chong Su Kong & Ors v Sia Hiong Tee & Ors (Messrs Johari & Zelika, third party)

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K21-5 OF 2006
CHEW SOO HO J
19 MARCH 2013

Civil Procedure — Appeal — Appeal from registrar to judge in chambers — Plaintiffs out of time to appeal if time based on when order was pronounced — Plaintiffs however within time to appeal if time based on date in sealed copy of order — Whether defendants' approval of draft order bearing wrong date of order led plaintiffs to believe they were within time to appeal — Whether just to allow plaintiffs to apply for extension of time to appeal — Whether clarification of order could not alter date on which order was pronounced — Rules of Court 2012 O 1A, O56 r 1(1) & (3) — Courts of Judicature Act 1964 s 3

The senior assistant registrar ('SAR') had made an order on taxation of costs in this action on 1 October 2012. A clarification of the order was sought and it was heard on 6 December 2012. On 13 December 2012 the plaintiffs filed an appeal to the judge in chambers against the SAR's decision pursuant to O 56 r 1 of the Rules of Court 2012 ('ROC'). At the outset of the hearing of the appeal, the first four defendants ('the defendants') raised a preliminary objection that the appeal was filed out of time and hence it ought to be dismissed in limine. The defendants argued that under O 56 r 1(3) of the ROC the appeal should have been filed within 14 days after the SAR's decision on 1 October 2012 as the decision pronounced on that date — going by the definition of the word 'decision' in s 3 of the Courts of Judicature Act 1964 ('CJA') — was one which finally disposed of the rights of the parties concerning the costs in the action. The plaintiffs, however, contended that their appeal was filed within time because the sealed copy of the SAR's order was dated 6 December 2012 and not 1 October 2012. This followed from the fact that when the plaintiffs' solicitors sent the draft copy of the SAR's order to the defendants' solicitors for approval with the order dated as 6 December 2012, the defendants' solicitors duly approved the same without amending the date of the order.

Held, dismissing the preliminary objection and ordering the plaintiffs to apply within ten days for extension of time to appeal under O 3 r 5 of the ROC:

(1) The 1 October 2012 order disposed of the rights of the parties on the issue of costs in the action and was thus an order or decision within the meaning of O 56 r 1(1) or (3) of the ROC and s 3 of the CJA (see para 5).

(2) The date of the clarification of the order could not be construed as the

date of the order. Any clarification sought subsequent to the date of the order did not extend the date when the order was made. Clarification was not itself a judgment, order or decision but a clarification of some ambiguity or technical or inadvertent error. It did not change the judgment, order or decision which had been pronounced and this was particularly so when after the clarification there was no variance to the judgment, order or decision that had been made (see para 5).

(3) The SAR's order should rightfully have been dated 1 October 2012 as there was no indication the court had ordered it to be dated with any other date. It was therefore wrong in law to have dated the order with a later date. For those reasons the plaintiffs were out of time in filing their notice of appeal (see para 7).

(4) However, by not insisting that the plaintiffs should have filed the order as pronounced on 1 October 2012 and by endorsing the error in the date of the order by approving the draft order without raising any amendment or objection thereto, the plaintiffs relied on the belief that the defendants had agreed and accepted the date of the order to be 6 December 2012 based on which they filed their notice of appeal (see para 9).

(5) Although O 56 r 1(3) was a mandatory provision as it used the words 'shall be filed within fourteen days …' a discretion was provided to the court when at the commencement of O 56 r 1(3) it stated 'Unless the Court otherwise orders …'. On the facts and circumstances of the case and on reading O 1A with O 56 r 1(3) of the ROC it was just that the plaintiffs should not be deprived of their right to appeal by such inadvertent error but should be allowed to apply under O 3 r 5 of the ROC to extend time to appeal (see para 10).

[Bahasa Malaysia summary

Timbalan pendaftar ('TP') telah membuat satu perintah pencukaian kos dalam tindakan ini pada 1 Oktober 2012. Satu penjelasan perintah dipohon dan didengar pada 6 Disember 2012. Pada 13 Disember 2012 plaintif-plaintif memfailkan rayuan kepada hakim dalam kamar terhadap keputusan TP menurut A 56 k 1 Kaedah-Kaedah Mahkamah 2012 ('KM'). Pada peringkat awal pendengaran rayuan, empat defendan ('defendan-defendan') pada awalnya mengemukakan bantahan permulaan bahawa rayuan tersebut difailkan melebihi had masa dan oleh itu menuntut agar rayuan tersebut ditolak sepenuhnya. Defendan-defendan menghujah bahawa di bawah A 56 k 1(3) KM, rayuan tersebut seharusnya difailkan dalam masa 14 hari selepas keputusan TP pada 1 Oktober 2012 memandangkan keputusan diumumkan pada tarikh tersebut — dengan menggunakan definisi perkataan 'keputusan' dalam s 3 Akta Mahkamah Kehakiman 1964 ('AMK') — iaitu sesuatu yang akhirnya melupuskan hak-hak pihak-pihak berhubung kos di dalam tindakan. Plaintif-plaintif bagaimanapun, menghujah bahawa rayuan mereka difailkan

dalam tempoh masa kerana salinan perintah TP yang termeterai bertarikh 6 Disember 2012 dan bukannya 1 Oktober 2012. Ini berikutan fakta bahawa apabila peguamcara plaintif-plaintif menghantar salinan draf perintah TP kepada peguamcara defendan-defendan untuk kelulusan perintah bertarikh 6 Disember 2012, peguamcara defendan-defendan turut sama meluluskannya tanpa meminda tarikh perintah tersebut.

Diputuskan, menolak bantahan permulaan dan mengarahkan plaintif-plaintif untuk memohon dalam jangka masa sepuluh hari untuk lanjutan masa untuk rayuan di bawah A 3 k 5 PM:

(1) Perintah 1 Oktober 2012 melupuskan hak-hak pihak-pihak mengenai isu kos-kos dalam tindakan dan oleh itu merupakan satu perintah atau keputusan dalam erti kata A 56 k 1(1) atau (3) KM dan s 3 AMK (lihat perenggan 5).

(2) Tarikh penjelasan perintah tidak boleh dianggap sebagai tarikh perintah. Sebarang penjelasan yang dipohon selepas tarikh perintah tidak melanjutkan tarikh perintah tersebut dibuat. Penjelasan itu sendiri bukan merupakan penghakiman, perintah atau keputusan tetapi satu penjelasan mengenai beberapa kesamaran atau kesilapan teknikal atau kesilapan yang tidak disengajakan. Penjelasan tidak mengubah penghakiman, perintah atau keputusan yang telah diumumkan dan terutama sekali apabila selepas penjelasan, tiada perubahan kepada penghakiman, perintah atau keputusan dibuat (lihat perenggan 5).

(3) Perintah TP sebetulnya bertarikh 1 Oktober 2012 memandangkan tiada petunjuk yang mahkamah mengarahkannya diubah kepada tarikh lain. Oleh itu adalah salah di sisi undang-undang untuk meletakkan tarikh perintah dengan tarikh selepas. Atas alasan-alasan tersebut, plaintif-plaintif berada di luar had masa ketika memfailkan notis rayuan mereka (lihat perenggan 7).

(4) Walau bagaimanapun, dengan tidak menegaskan bahawa plaintif-plaintif seharusnya memfailkan perintah seperti yang diumumkan pada 1 Oktober 2012 dan dengan mengesahkan kesilapan pada tarikh perintah dengan meluluskan draf perintah tanpa mengemukakan sebarang pindaan atau bantahan, plaintif-plaintif bergantung kepada kepercayaan bahawa defendan-defendan telah bersetuju dan menerima tarikh perintah ialah 6 Disember 2012 berdasarkan notis rayuan yang mereka failkan (lihat perenggan 9).

(5) Walaupun A 56 k 1(3) merupakan peruntukan mandatori memandangkan ia menggunakan perkataan-perkataan 'perlu difailkan dalam tempoh empat belas hari …' satu pertimbangan diberikan kepada mahkamah apabila pada permulaan A 56 k 1(3) dinyatakan 'Melainkan Mahkamah mengarahkan sebaliknya …'. Berdasarkan fakta-fakta dan

keadaan kes dan dengan membaca A 1A dengan A 56 k 1(3) KM, plaintif-plaintif tidak seharusnya dinafikan hak mereka untuk merayu hanya disebabkan kesilapan yang tidak disengajakan tersebut tetapi seharusnya dibenarkan untuk memohon di bawah A 3 k 5 KM bagi lanjutan masa untuk rayuan (lihat perenggan 10).]

Notes

For cases on appeal from registrar to judge in chambers, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 822–829.

Cases referred to

Bozson v Altrincham UDC [1903] 1 KB 547, CA (refd)

Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)

Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd [2001] 2 MLJ 50, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3

Rules of Court 2012 O 1A, O 3 r 5, O 42 rr 5, 7(2), O 56 r 1, 1(1), (2), (3)

(Roland Cheng & Co) for the plaintiff.
(Grace Chaw & Co) for the defendant.
(State Attorney General's Chambers) for the defendant.
(Nohin & Partners) for the third party.

Chew Soo Ho J:

ENCLOSURE 11

INTRODUCTION

[1] The plaintiffs have filed an appeal on 13 December 2012 against the order of the learned senior assistant registrar ('SAR') made on 1 October 2012 on the taxation of costs in respect of this action to the judge in chambers pursuant to O 56 r 1 of the Rules of Court 2012.

[2] At the onset of this appeal, learned counsel for the first to the fourth defendants had raised a preliminary objection that this appeal was filed out of time and thus not maintainable and ought to be dismissed in limine.

[3] Upon this preliminary objection, both parties have advanced thier respective arguments vide written submissions for the determination by this

court on this issue.

FINDINGS OF COURT

[4] The order of the learned SAR on taxation was undoubtedly made on 1 October 2012 but a clarification of the order was sought and it was heard on 6 December 2012 whereupon the plaintiffs then filed the appeal on 13 December 2012 against the decision of the learned SAR. If the appeal is against the decision of the learned SAR made on 1 October 2012 the appeal would be out of time when it was filed on 13 December 2012 and if the date of clarification is construed to be the date of the decision of the learned SAR which is 6 December 2012, then the notice of appeal lodged on 13 December 2012 would be well within the 14 days after the said clarification order as contended by learned counsel for the plaintiffs.

[5] Order 56 r 1(1) of the Rules of Court 2012 provides that 'An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court'.

Order 56 r 1(3) of the Rules of Court 2012 states:

> (3) Unless the Court otherwise orders, the notice shall be filed within fourteen days after the judgment order or decision appealed against was given or made, and shall be served not less than five days before the date fixed for the hearing of the appeal.

Learned counsel for the defendant contended that by referring to s 3 of the Courts of Judicature Act 1964, the word 'decision' means 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties' citing *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495; *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50. In short for the purpose of appeal if O 56 r 1(1) and/or r 1(3) of the Rules of Court 2012 is to be read together with the definition of 'decision' as provided under s 3 of the Courts of Judicature Act 1964, it would mean that the 'judgment, order or decision' given or made by the registrar of the High Court must have finally disposed of the rights of the parties but does not include any ruling in the course of a trial or hearing which does not finally dispose of the rights of the parties. In *Bozson v Altrincham UDC* [1903] 1 KB 547, the English Court of Appeal held that if the judgment or order, as made, finally dispose of the rights of the parties, then it ought to the treated as a final order. From the facts in the instant case, the order on the taxation of costs was made by the learned SAR on 1 October 2012 and that order would have disposed of the right of the parties when it was made on the issue of the costs in the action. Such order is thus an order or decision within the meaning of O 56 r 1(1) or r 1(3) of the Rules of Court 2012 and/or s 3 of the Courts of Judicature Act 1964. Any clarification sought subsequent to the date of such

judgment or order or decision does not extend the date when such judgment order or decision was made. In any event, clarification of a judgment, order or decision, in my view, is not itsetf a judgment, order or decision but it seeks to clarify what may seem ambiguous or some technical or inadvertent errors but it does not change the judgment, order or decision which had been pronounced. This is particularly so when after the clarification, there is no variance of the judgment, order or decision that had been made. I do not think that the date of the clarification of the judgment, order or decision of the SAR can be construed as the date of the judgment, order or decision for if it is so, it can undoubtedly be subject to abuse for simple reason that an appellant who would be out of time to file his appeal could then make a request for clarification in order to extend or enlarge the time to avoid a more onerous application for extension of time.

[6] Learned counsel for the plaintiffs contended that pursuant to O 42 r 5 of the Rules of Court 2012, the sealed order of the SAR dated 6 December 2012 was initially sealed on 13 December 2012 and thus when the plaintiffs' notice of appeal was filed on 13 December 2012, it was in compliance with the 14 days time frame under O 56 r 1(3) of the Rules of Court 2012. I find that this argument can be dispelled by reading O 42 r 7(2) which says that:

> 7(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

[7] The order of the learned SAR was pronounced on 1 October 2012 and rightfully, it must be dated with this date as there is no indication that the court had ordered it to be dated with any other date. It would therefore be wrong in law to date the order with a later date when there is no order from the court to date other than the date of the pronouncment of the order.

[8] For the foregoing reasons, I hold that the plaintiffs are out of time when they filed their notice of appeal on 13 December 2012 from the date of clarification on 6 December 2012 instead of the date of the pronouncement of the order on 1 October 2012.

[9] However, in the particular circumstances of this case where the draft order of learned SAR was sent to learned counsel for the first to fourth defendants for approval, it was duly approved without amending the relevant date of the order which was stated as 6 December 2012 to 1 October 2012 and consequently the sealed order of court is dated 6 December 2012 upon which the plaintiffs have filed their notice of appeal. By not insisting that the plaintiffs must first filed the order of court as pronounced on 1 October 2012 before the subsequent order on 6 December 2012 after the clarification, the plaintiffs

relying on the belief that the first to fourth defendants had agreed and accepted the date of the order to be 6 December 2012, would be deprived of their rights to appeal for want of time because of such an error which the first to fourth defendants had apparently endorsed when they approved the said draft order without raising any amendment or objection. Order 1A of the Rules of Court 2012 states that:

> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non compliance with these Rules.

[10] Order 56 r 1(3) is no doubt a mandatory provision when it uses the word 'shall be filed within fourteen days …' Nevertheless, a discretion is vividly provided to the court when at the commencement of this O 56 r 1(3), it states 'Unless the Court otherwise orders …'. On the fact and circumstances as alluded above and reading O 1A and O 56 r 1(3) of the Rules of Court 2012 together, I find it just that the plaintiffs should not deprived by such inadvertent error but should be allowed to make an application under O 3 r 5 of the Rules of Court 2012 to extend or abridge the time to appeal in the interest of justice and I so order that such application is to be filed within ten days from the date hereunder. With that, I dismiss this preliminary objection. However, I allow costs to the first to fourth defendants in the sum of RM1,500 on ground that the first to fourth defendants' contention is technically correct pursuant to O 56 rr 1(1) and 1(2) of the Rules of Court 2012.

Preliminary objection dismissed and plaintiffs ordered to apply within ten days for extension of time to appeal under O 3 r 5 of the Rules of Court 2012.

Reported by Ashok Kumar